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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUAN ORTIZ, Defendant and Appellant.	B199037 (Los Angeles County Super. Ct. No. BA255481)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob Bowers, Judge. Reversed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Juan Ortiz was convicted of insurance fraud and conspiracy to commit insurance fraud after the hotel he owned was burned in an obvious arson fire. We find that the prosecution failed to establish the prerequisites to the admissibility of an alleged coconspirator's lengthy testimonial statement taken by two law enforcement officers without affording the defendant a contemporaneous opportunity to cross-examine the coconspirator. Undisputed evidence showed that the conspiracy had been thwarted by the time of the interrogation, and the coconspirator's statements were not made in furtherance of a charged conspiracy to deceive law enforcement. We conclude for that reason that the admission of a recorded police interrogation of one of the alleged but uncharged coconspirators violated appellant's right to confrontation under the United States Constitution. As respondent has failed to show the error was harmless under the correct standard of review, we reverse the judgment. We do not reach appellant's remaining contentions.

BACKGROUND

1. *Procedural History*

At 3:41 a.m., August 16, 2001, a fire broke out at a residential hotel known as The Palomar Hotel. The incident frightened dozens -- and killed one -- of the residents, and it severely injured several firefighters when the third and fourth floors of the hotel collapsed.

On April 23, 2004, the hotel owner, appellant Juan Ortiz, was charged by information with 11 felony offenses relating to this fire. The charges included murder, conspiracy to commit arson and insurance fraud, arson causing great bodily injury, arson of an inhabited structure or property, and insurance fraud.

Appellant's first jury trial commenced July 5, 2005. On October 11, 2005, the jury convicted him of count two, conspiracy to commit insurance fraud, and count 10, insurance fraud in violation of Penal Code section 550, subdivision (a)(1). The jury was

unable to reach verdicts on the remaining counts, and the trial court declared a mistrial as to counts 1, 3 through 9, and 11.

Appellant's second trial on counts one, three through nine, and 11, began March 7, 2006. On July 5, 2006, the jury found Ortiz guilty of insurance fraud, in violation of Penal Code section 550, subdivision (a)(5), as alleged in count 11. The jury was unable to reach verdicts on the remaining counts, and the trial court declared a mistrial as to them. The court denied appellant's motion to dismiss the remaining counts, and a third jury trial went forward on September 21, 2006.

During the third trial, appellant brought a motion for new trial as to counts 10 and 11 on the ground of newly discovered, previously unavailable evidence: the live testimony of Joseph Lewellen, who had previously been charged as a coconspirator. Although the charges against Lewellen had been dismissed after the preliminary hearing and never refiled, he did not receive immunity for his testimony until the third trial. The court denied the motion on January 22, 2007. The third trial resulted in acquittal on all remaining charges.

On May 8, 2007, the trial court sentenced appellant to five years in prison, consisting of the upper term of five years as to count 2, conspiracy to commit insurance fraud, and the middle term of three years each as to counts 10 and 11, insurance fraud, with the latter terms stayed pursuant to section 654. Custody credit totaled 2,533 days. Appellant filed a timely notice of appeal the same day.

2. *The Prosecution Evidence -- First Trial*

Appellant purchased the 48-room Palomar Hotel in 1998, taking title with his wife, Luz Ortiz.[1] In August 2001, the residential hotel had 40 tenants living in 31 rooms, with 17 rooms vacant. Appellant's brother, Arturo Ortiz, also known as Juan Salazar, was employed as the hotel's resident manager. Appellant's stepfather, Joseph Lewellen,

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[1] Because there were several witnesses named Ortiz, we refer to them by their first names after first mention in order to avoid confusion.

worked in the office. Even though Lewellen spoke little Spanish, he helped out when appellant, who spoke primarily Spanish, had difficulty reading or understanding English or communicating with tenants.

As soon as he had purchased the hotel, appellant was found to be in violation of various fire, housing, and health and safety codes. The court fined him, placed him on probation, ordered him to remedy the violations in five phases, each with an interim deadline, and ordered appellant not to sell the hotel without leave of court.

In May 1999, a fire in the building next door substantially damaged three rooms at the Palomar Hotel. The back wall of the building burned, and some windows were burned out. Appellant presented a proof of loss to his insurance company and received over $200,000 as a result of that claim.

In 2000, appellant consulted a lender and applied for a $500,000 loan to pay the cost of repairs. The lender notified him on June 6, 2001, that he would have to obtain a subordination agreement from the holder of the first trust deed and a letter from the city of Los Angeles (City) detailing repair requirements. The lender never received the requested documents, and so the application went no further.

In the spring of 2001, appellant was charged with a probation violation for failing to bring the building into compliance. The court extended appellant's deadline to June 28, 2001.

On June 21, 2001, a real estate agent presented to Lewellen a $600,000 offer to purchase the hotel. Lewellen said he would discuss the offer with his stepson. The broker never heard back from him.

A building inspector with the Los Angeles Department of Building and Safety found violations on July 10, 2001, and ordered appellant to comply within 90 days. On July 20, 2001, a City electrical inspector found cracked conductors, broken insulation, abandoned wiring, and some missing smoke detectors. He set a compliance date of August 24, 2001.

Appellant's counsel in a 1999 civil matter, Buffy Lyn Roney, testified that appellant could speak, read, and understand only very simple English and that Lewellen wrote letters to her for appellant's signature. She thought that Lewellen was a domineering man who was abusive toward appellant, and that appellant was passive and did whatever Lewellen told him to do, even if it was dishonest. Roney's legal services ended in a fee dispute, and she claimed that Lewellen encouraged appellant to commit perjury when the dispute went to trial.

In April or May 1999, Roney went to the hotel and spoke to Lewellen, who told her about the repairs to the hotel the City had demanded; Lewellen complained that it was discriminatory and unfair. When Roney asked whether appellant intended to make the repairs, Lewellen said, "Either make the repairs or burn it down." Sometime after that, Lewellen left a message on her machine to the effect that he wanted to hire an attorney who would play really "dirty," and later she received a call from "them" about bringing a fraud action against a broker for failing to disclose problems with the hotel at the time of purchase. Roney referred appellant to a real estate lawyer.

On August 4, 2001, Lewellen telephoned the Hollywood Division of the Police Department to report that two days earlier, a tenant had threatened to kill him and burn down the hotel. Lewellen reported that appellant and Arturo witnessed the incident.

The fire broke out at 3:41 a.m. on August 16, 2001. Dozens of residents were inside at the time. Some climbed out of windows and clung to the ledges until firefighters rescued them. Several firefighters were severely injured when the third and fourth floors of the hotel collapsed. One resident fell to her death after lowering her children to firefighters who were on a ladder.

Arturo also died. Firefighters found his charred body bent over a partially filled canister of gasoline. Despite the August heat, he was wearing multiple layers of clothing, which is a common practice of arsonists. Arturo's clothing later tested positive for gasoline residue. Investigators found pour patterns of an ignitable accelerant on the first landing, the stairs to the second floor, the second floor landing, and on the stairs to the

third floor. The odor of gasoline permeated those areas. They determined that the electronic ignition of the pilot light of a nearby water heater had ignited gasoline vapors, causing the explosion which killed Arturo and started the fire. One testified that it was the most obvious case of arson he had ever investigated.

Not far from where they discovered Arturo's body, investigators found several five-gallon buckets filled with gasoline. They located five more buckets of gasoline in other areas -- 40 gallons in all.[2] A fingerprint expert identified appellant's fingerprint on the lid of one of them and his palm print on a bag in which a bucket was found.

After the fire, detectives found $10,400 in cash in the trunk of Arturo's car, along with family birth certificates, payroll checks payable to Arturo's common law wife Maria Elena Delgado, Ms. Delgado's Mexican passport, tax returns, and marriage license (with Ms. Delgado's first husband). They also found a painting of the Last Supper. According to Ms. Delgado, documents and money were ordinarily kept in the hotel safe. Later, at a storage unit not far from the hotel, other items were seized including hotel furniture, a refrigerator, and Arturo's vehicle registration certificate. Lewellen had rented the storage unit on August 2, 2001, listing appellant, Arturo and Delgado as persons with authorized access.

Delgado testified that she lived at the hotel with Arturo and their daughters. A few days before the fire, when she noticed that the stove and refrigerator were missing from their rooms, Arturo told her that the rooms were going to be repaired. When she left for work the afternoon before the fire, the painting of the Last Supper still hung on the wall of their apartment. She said it had sentimental value for Arturo.

Hotel resident Miguel Galindo -- husband of the woman who died trying to escape the fire -- testified that he had observed appellant and Lewellen filming the hotel a few

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[2] The evening before the fire, a neighbor had observed a man who matched Arturo's description removing or loading 10 large paint cans from the trunk of the car later identified as Arturo's.

days before the fire. A few weeks after the blaze, when Galindo encountered Lewellen at the storage facility, Lewellen accused him of having set the fire.[3]

The hotel was insured by California Fair Plan with a $900,000 limit on the building and $50,000 on the contents. In February 1999, Lewellen had signed the application for the insurance, listing appellant as the owner. On August 17, 2001, Lewellen telephoned the hotel's insurance agent to report the claim, and the agent notified California Fair Plan.

After the fire, appellant retained a public insurance adjuster, William G. Rake with Greenspan Company (Greenspan). Rake testified that he met with appellant and Lewellen. Because the hotel was unsafe and badly damaged, it was not possible to create an inventory of the contents by examination. Thus Lewellen, who Rake believed to be in charge, gave him a list of items that had been in the hotel. Rake created an inventory based on the list and his conversations with Lewellen. Because Rake spoke no Spanish, all conversations were with Lewellen, even when appellant was present. No one translated for appellant.

Lewellen told Rake that each room contained an eight-drawer dresser, a double bed, a five-foot-round wooden table, two chairs, a headboard, a lamp, a bedside table, and bedding. Lewellen also claimed that the hotel kept six to eight small refrigerators and six to eight 19-inch color televisions, and the hotel would rent these to tenants. Lewellen told Rake that the televisions had been purchased in 2001 during a close-out sale at Montgomery Ward and that the refrigerators had been purchased new at Sears that same year. Lewellen's list included 60 box springs and mattresses that Lewellen claimed were new -- purchased from a Marriott hotel and a Holiday Inn in 2001. King-size sheets were on the list even though there were no king-size beds. Lewellen told Rake that the hotel stored eighteen 19-inch television sets, mattresses, and other furniture in rooms on the

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[3] An employee of the storage facility testified that Lewellen and Galindo had several hostile encounters before and after the fire.

north side of the hotel that had been rendered uninhabitable by the 1999 fire. Lewellen also told Rake that he could not produce records or receipts because the authorities had seized them.

Rake gave the list to a Greenspan inventory specialist, Larry Redholtz, along with the values of the items listed. Redholtz prepared a spreadsheet and met with Lewellen and appellant. Ordinarily, Redholtz would have obtained information about the age of the items from the insured during such a meeting. However, he did not bother to do so because the values were so overstated and the policy limit was only $50,000. Redholtz testified that the inclusion of nonexistent king-size sheets was his own typographical error.

Using the information Lewellen provided, Rake prepared a sworn proof of loss that appellant and Luz signed before a notary (but not in Rake's presence) on October 26, 2001. Appellant claimed policy limits of $50,000 for the hotel contents, but represented the value of all lost items to be $231,374. Rake sent the proof of loss to S.W. Eller, California Fair Plan's adjustor.[4]

James Kumura, a financial analyst and certified fraud examiner for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), testified regarding records and receipts seized from appellant's home on August 22, 2001, pursuant to a search warrant. There were some Montgomery Ward receipts but none for the purchase of eighteen 19-inch television sets for $239 each as claimed in appellant's inventory list. Kumura found a receipt for four 19-inch televisions that had been purchased for $139 each with a 50 percent discount, for a total cost of $302, not the $4,656 for 18 new television sets as listed in appellant's inventory. Kumura found a receipt for the purchase of a washer and dryer kept at appellant's home but claimed on appellant's inventory. There were no receipts from the Marriott or Holiday Inn, which had been listed on the inventory as the

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[4] The building claim was based upon Fair Plan's appraisal of $604,000, exclusive of land, plus demolition and debris removal, for a total structure loss of $757,881.

sellers of 60 new box springs and mattresses acquired by the hotel before the fire. Kumura also determined that appellant was solvent on the day of the fire.

Frank Frisina, an independent claims adjuster employed by S.W. Eller Company, which had been retained by California Fair Plan, reviewed and investigated questionable items in appellant's inventory -- eighteen 19-inch color television sets, eight small refrigerators, and 60 new box springs and mattresses. Frisina testified that he found no new television sets, only old ones with knobs and dials. The mattresses and small refrigerators were used as well.

Frisina employed a salvor, and the two of them inspected the hotel on November 5, 2001, in an attempt to verify the large number of items claimed in appellant's inventory. Frisina testified that he found nothing salvageable but did not know whether looters or others had removed anything. Frisina had no idea what had been in 19 of the rooms because they were unable to inspect them. They found some of the items listed in appellant's inventory, but not in the quantities stated.

Frisina testified that although the number and age of the items in the inventory were inaccurate, there was in excess of $50,000 in verifiable damage to contents of the hotel. Ultimately, S.W. Eller found that the loss to the contents of the hotel reached $208,000.

Alfred Hess, Vice President of Claims for California Fair Plan, testified that appellant's policy provided that any misrepresentation or concealment in a proof of loss would void the policy. Because the Fair Plan adjuster determined that the age of mattresses and television sets had been misrepresented, the company rejected the proof of loss on November 5, 2001, the time of that determination.[5]

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[5] The adjustment of the claim was suspended pending a final report from the adjuster because of the inability to examine appellant under oath. Hess explained that although the investigation was not completed, it was considered complete for purposes of determining fraud as soon as they had the facts needed to deny the claim on that basis.

3. *The Videotape of Lewellen's Interview -- First Trial*

On November 6, 2001, the day after the Fair Plan rejected the loss, ATF Special Agent Susan Holden and Detective Enriquez interviewed Lewellen at the ATF office. Defense counsel objected to Holden's testimony about the interview, and the court held a pretrial hearing pursuant to Evidence Code section 403.[6] In addition to the hearsay objection, the defense asserted a violation of the Confrontation Clause of the Sixth Amendment of the United States Constitution, based on the holding of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

Respondent claimed that Holden's testimony came within the Evidence Code section 1223 hearsay exception for coconspirator statements made during and in furtherance of a charged conspiracy. For purposes of the court's determination, both counsel agreed that the last overt act of the conspiracy to commit insurance fraud alleged in count two occurred on October 25, 2001, when the sworn proof of loss was filed with the insurance company. Counsel also agreed that both appellant and Lewellen were taken into custody on November 21, 2001, after the November 6, 2001, interview. Respondent asserted that because the insurance claim remained open and subject to adjustment, the conspiracy had not ended. The court ruled that the conspiracy ended with the November 21, 2001 arrests, overruled the defense objections, and permitted Special Agent Holden to testify regarding Lewellen's statements to her and Detective Enriquez.

Holden testified that Lewellen told her about the 1999 fire damage to the three back rooms that were being used for storage. He told the two detectives that he had made several police reports regarding threats by tenants to burn the hotel down. Lewellen also described the hotel's issues with the Department of Building and Safety and said that "we" were fixing and repairing the plumbing, but did not have enough money to fully refurbish it. (As he spoke, he usually said "we.") Lewellen admitted that they had taken

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[6] Evidence Code section 403 sets forth the procedure for determining foundational and other preliminary facts necessary to the admissibility of evidence where relevance, personal knowledge, or authenticity is disputed.

Arturo's stove and refrigerator to the storage facility because, he claimed, fire inspectors had required their removal from the rooms where Arturo lived with Delgado and their children.

Over defense hearsay and *Crawford* objections, the prosecution played for the jury the two-and-a-half-hour videotape of the interrogation of Lewellen by Holden and Detective Enriquez.[7] The officers' questions elicited the following responses:

- Lewellen described typical rooms, their furnishings, and the rental rates. He said that television sets and refrigerators were available for the tenants to rent.

- Lewellen acknowledged that the hotel did not have king-size sheets and said that the inventory list must have contained a typographical error. When asked about the age of the mattresses, he told the officers that they were "new [to] us" and in good condition, bought from the Marriott and Holiday Inn in an auction. He said, "There's no fraud there."

- Lewellen claimed that all of the City's fines due in August had been paid and that appellant was constantly upgrading the hotel.

- Lewellen told the officers that the storage space had been rented for Arturo's use, not the hotel's, because Arturo had to move his furniture to storage when the City said they could not live on the first floor. The hotel safe usually contained Delgado's immigration papers, the children's birth certificates, and receipts for cash received from tenants. Lewellen claimed that he never put anything in the safe and took the rent money home to Ortiz each day.

- Lewellen told the officers that it was appellant, not he, who hired Greenspan. Lewellen created the inventory list for the insurance company and filled out

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[7] Because the prosecution did not give Lewellen immunity until the third trial, the videotaped interrogation was played in both the first and second trials. Lewellen testified live in the third trial.

the proof of loss. He listed the lost items without benefit of receipts because they had been seized pursuant to the search warrant.

- When Enriquez asked Lewellen how he thought the fire started, he replied that Enriquez and a television reporter had said that it was gasoline and that residents, including Delgado, had told him they smelled spent fireworks or gunpowder. However, he claimed that he knew nothing first hand. Lewellen said, "I don't know. I don't know. You're telling me it was gasoline?"

- Holden asked Lewellen whether he knew of someone who was so infuriated with him, appellant, or Arturo that he might have started the fire. Lewellen replied that the only person he knew of was Miguel [Galindo], who had made statements to the effect that he was going to bomb and burn the place and kill them. Lewellen reported the threat to the police approximately one month after the fire.

- When Agent Holden suggested that Lewellen had conspired with appellant to pay Arturo to set the fire in order to collect the insurance proceeds, Lewellen said, "Oh, please, lady. It wasn't even insured for that much money." When Holden pointed out that the $900,000 policy limits were greater than the offer he had received to purchase the hotel, Lewellen called the suggestion "ridiculous" and "insulting."

After the video was played for the jury, Holden testified that she concluded from Lewellen's demeanor that he had been untruthful in many parts of the interview.[8]

4. *The Defense -- First Trial*

In addition to an attack on the sufficiency of the evidence, appellant's theory of defense was twofold: (1) Arturo set the fire alone and out of spite, and (2) appellant did

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[8] In the pretrial Evidence Code section 403 hearing, the defense objected to all of Holden's testimony regarding the interrogation, but did not object at trial specifically to the question regarding Holden's opinion of Lewellen's veracity and did not move to strike her response.

not prepare or read the inventory or understand its contents and thus had no intent to defraud.

Appellant's sister Celia Garcia testified that Arturo was appellant's half-brother. Arturo had a violent temper, long periods of "black" moods, and he resented appellant. Garcia testified that she and appellant were close and that appellant appeared to be happy -- he was fixing up the hotel and never said he was worried about finances.

Maria Elena Delgado was recalled to testify for the defense. She stated that she lived with Arturo and their daughters in two rooms on the first floor of the hotel. His job at the hotel was to rent rooms and clean the property. He swept, mopped, and cleaned for $210 per week and rent-free rooms. She told of Arturo's violent abuse of her and their children and his resentment toward appellant.

Appellant's wife Luz testified that she did not participate in the management of the hotel, but she did help appellant with the hotel's books. She testified that appellant spoke to Luz about the problems with the City, but never told her that the hotel had become too expensive to repair or that he was having trouble keeping the hotel going. Once, appellant received an offer to buy it, but he said he wanted to improve it, not sell it.

Luz also testified about Arturo's habitual drunkenness, his violent temper, and his rage toward appellant.[9] When she and appellant worked on the books, they found evidence that Arturo was stealing. Lewellen complained about Arturo and told her he thought that appellant should fire him.

Attorney George Sellers testified that he represented appellant in his dealings with the City, appeared in court for him, and negotiated for more time to comply with the repair orders. Appellant did not express pessimism about the building's future and never expressed a desire to dispose of the building. Appellant wanted to continue the operation at almost any cost and was trying to refinance the hotel to pay for the repairs.

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9 Several hotel residents testified during the prosecution's case that Arturo often appeared to be intoxicated. One of them testified that in July 2001, his behavior became "frightening" and he was remiss in his duties. Another described him as "edgy" -- the sort of person who was calm one moment but uptight the next.

Appellant testified in his defense through a Spanish interpreter. He had lived in the United States for approximately 30 years and had been a citizen for 15. Appellant reached only the sixth grade in Mexico but studied two or three semesters in this country to prepare for the citizenship test. Before purchasing the Palomar, he had been employed at a San Fernando hotel for nine or 10 years.

Lewellen had lived with appellant and his family since they had known him. Appellant trusted Lewellen and placed him in charge of the office at the Palomar. Lewellen translated for him and spoke to tenants and building inspectors. Lewellen was not bilingual but spoke some Spanish. Lewellen also helped appellant read documents in English because appellant was barely able to read English. On many occasions, appellant signed documents without reading them because Lewellen told him to do so.

Although appellant and Arturo had a hostile relationship and argued a great deal, appellant hired Arturo because he had a strong sense of family and wanted to help him out.

Appellant testified that he was not worried about finances as a result of the building inspections. Immediately after acquiring the hotel, he started painting and installing carpeting. He bought beds from a Santa Ana business that had a trailer full of mattresses, lamps, and mirrors. He also bought dressers.

Extinguishing the 1999 fire caused extensive water damage and left a huge hole in the wall. Appellant used the insurance money from that fire to repair the hotel. He obtained permits, hired a licensed contractor, and began to make the repairs specified by City building inspectors. But appellant had to retain an attorney to deal with them because the inspectors appeared to be playing games or trying to make him fail by changing their minds and ordering him to do things differently from what was called for in previous City orders. Appellant testified that he often bought five-gallon buckets at Home Depot -- some empty so he could store materials in them and some filled with paint or joint compound. His fingerprints may have been on them because he did the

minor plumbing and electrical repairs himself and touched the buckets just as he touched everything else in the hotel.

Appellant claimed that he never wanted to sell the hotel, and it never crossed his mind to burn it down. He had approximately $100,000 in equity in his home and owned two rental houses, which had never been in default. He was not facing a balloon payment and had no debts other than his mortgages and car loans.

Appellant also testified regarding Arturo's resentment of him, Arturo's mistreatment of tenants, and the poor quality of Arturo's work. He testified that he was planning to fire Arturo.

In July 2001, the Department of Building and Safety notified appellant that Arturo could no longer occupy the apartment on the first floor behind the office. Appellant testified that this was the excuse he needed; simply firing Arturo might have required him to move in with Mario, his wife, and children in their small apartment, which would have caused problems in the family. Appellant admitted that he rented the storage space for Arturo, but claimed he did so because the City had told him to remove everything from Arturo's apartment. Appellant offered to pay a few months' rent on an outside apartment until Arturo got settled. Although appellant used the uninhabited north rooms for storage, he did not store Arturo's belongings in the hotel or offer him other rooms because he just wanted him out.

Appellant admitted that he signed the proof of loss, but claimed that no one read it to him before he signed it. Appellant said that although he saw some paperwork, he did not see the typed inventory prepared by Greenspan. He admitted that he never had king-size beds at the Palomar and did not know why the inventory listed king-size sheets. He claimed that he bought the 18 color television sets on sale, intending to give them to family members in Mexico, not to use them in the hotel. The television sets were stored at his home, and he was unaware that the inventory included them until he learned it in court. He denied authorizing anyone to put them in the inventory. Appellant denied that he instructed Lewellen to claim any furniture purchases as new or even telling him that

any items were new. He described the quantities for Lewellen and said they were in pretty good condition, but never said they were new.

Appellant claimed that he did not read the typed list prepared by Greenspan. He never saw the typed list that was submitted with the sworn proof of loss. Lewellen created the handwritten list in evidence by writing everything down during their discussions.

Appellant admitted having suggested to his commercial tenants that they obtain insurance, but he denied contemplating burning down the hotel when he made the recommendation. He denied that he conspired to burn down the hotel.

5. *The Second Trial*

Appellant's briefs do not summarize the facts of the second trial. Respondent represents that the evidence was substantially the same as what was presented in the first trial and summarizes the notable differences in its brief, without objection or additions from appellant. Therefore, we are not including the testimony that was substantially similar to what occurred during the first trial. We summarize the portions of the record identified by respondent, adding relevant procedural facts and omitting respondent's occasional argument and testimony.

Although Buffy Roney testified once again, she was not asked about the lawsuit appellant had brought against her and thus did not give her opinion that appellant committed perjury.

Respondent called an additional witness, William Rafart, a public insurance adjustor with Greenspan, who testified that he and another Greenspan employee met with appellant and Lewellen on September 4, 2001, the date appellant retained the company in relation to the August 16 fire. Rafart had been involved in adjusting the 1999 fire when he was employed by another adjusting firm that appellant had retained. Rafart was fluent in English and Spanish and spoke English to Lewellen and Spanish to appellant, but his explanations regarding the retainer agreement were all directed to Lewellen. Lewellen

then instructed appellant to sign the agreement. Although Rafart could not recall whether appellant was able to read English, appellant appeared to understand the process of filing and adjusting an insurance claim, and both men were familiar with Rafart's services from the 1999 fire.

Arturo's widow, Maria Elena Delgado, again testified about Arturo's resentment of appellant, his drinking, and his abuses of her and her children. Delgado also testified that she often observed appellant conversing with Lewellen and Arturo in English.

Appellant's wife, Luz Ortiz, again testified that Arturo was often drunk and abused appellant. Luz stated that appellant and Lewellen got along, but appellant never permitted him to make any decisions regarding the hotel or finances. She did not get involved with insurance matters but signed papers whenever appellant told her to do so.

Appellant testified largely as he had in the first trial.[10] His additional facts include the following:

- Lewellen spoke very little Spanish and they conversed mostly in English, although appellant often did not understand him. Lewellen read documents in English and summarized them for appellant in English.
- Appellant did not completely trust Lewellen and felt impotent when he could not read the documents himself.
- The 1999 fire damaged approximately one quarter of the hotel. Appellant signed a proof of loss in support of the insurance claim and used insurance proceeds to make repairs to the hotel.

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10 Defense counsel filed a motion to preclude the use of appellant's first trial conviction to impeach him because of the danger of undue prejudice. The People filed a motion in limine to allow the impeachment. Relying on *People v. Massey* (1987) 192 Cal.App.3d 819, 825, the court held that precluding the impeachment with the conviction would give appellant's testimony a "'false aura of veracity,'" but ruled that the prior conviction would be "sanitized." Thus, the People were permitted to ask: "Have you been convicted of a felony involving theft?" Appellant replied, "Yes."

- The hotel had been appellant's "dream." He made all financial decisions with regard to improvements without consulting Lewellen, and he was the only one who signed invoices for work done at the hotel.
- Appellant saw Arturo steal from him, and upon reviewing the records of tenant payments, he discovered that dates had been changed to reflect a shorter stay in the hotel.
- At the time he signed the proof of loss in 2001, appellant understood what a proof of loss was. He had signed the same type of document for the 1999 claim. When asked if he spoke with Lewellen about People's exhibit 156, appellant responded, "Not really."[11] Asked whether he had reviewed a list of lost items, appellant replied, "Some items I did mention them to him." When reminded that he had previously acknowledged telling Lewellen how many mattresses, mirrors, and dressers there had been in the hotel, appellant admitted that he had given that information to Lewellen.
- Appellant denied that he told Lewellen to describe furniture as "new" and acknowledged that the televisions listed on the proof of loss had not been in the hotel at the time of the fire.

DISCUSSION

1. *Contentions*

Appellant identifies 14 issues in which the trial court allegedly erred. Some involve just the first trial, and others involve the first and second trials.[12] However, we

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[11] Respondent describes the document as the proof of loss, which was exhibit 117. Exhibit 156 was the handwritten inventory list written by Lewellen and attached to the spreadsheet inventory that Greenspan prepared.

[12] Appellant contends: The trial court abused its discretion in admitting evidence of his first trial conviction of counts two and 10 for purposes of impeachment in the second trial (Point I); the court read but failed to provide the jury with the written version of

reach just two of them (Points III and IV as listed in footnote 11, *ante*) because they lead to our conclusion that reversal is required by *Crawford*, *supra*, 541 U.S. 36.

2. *The Coconspirator Hearsay Exception and the Confrontation Clause*[13]

In *Crawford*, the United States Supreme Court held that the Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the admission of out-of-court "[t]estimonial statements of witnesses absent from trial [unless] the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."

CALJIC No. 15.40 in the first trial (Point II); Lewellen's videotape constituted inadmissible hearsay and *Crawford* error (Points III and IV); the trial court abused its discretion in denying his motion for new trial as to the first and second trials (Point V); the prosecution should have granted Lewellen immunity during the first and second trials (Point VI); the trial court should have excluded evidence of the 1999 fire and insurance claim under Evidence Code sections 352 and 1101 (Point VII); certain jury instructions should have been given sua sponte and others should not have been given in the first and second trials (Points VIII through XII); the court committed judicial misconduct (Point XIII); and the insurance fraud convictions are not supported by substantial evidence (Point XIV).

13 As described earlier, appellant contends that the trial court erred in admitting the videotape of the police interrogation of Lewellen and related testimony over his hearsay and *Crawford* objections. In response to appellant's hearsay objections, the prosecution asserted Evidence Code section 1223: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence." The court found that the conspiracy to commit insurance fraud was ongoing at the time of Lewellen's statements and overruled appellant's objections.

(*Crawford*, *supra*, 541 U.S. at p. 59.)[14] However, statements in furtherance of a conspiracy are not by their nature testimonial. (*Id*. at p. 56, and cases cited therein.)[15]

Respondent contends that we must review the trial court's ruling for an abuse of discretion. Although we agree that the admission of evidence over a hearsay objection is normally reviewed for an abuse of discretion (*People v. Martinez* (2000) 22 Cal.4th 106, 120), because the admission of Lewellen's statements and the testimony regarding them implicate the constitutional right of confrontation, we independently review the court's rulings. (*People v. Seijas* (2005) 36 Cal.4th 291, 304; also see *Crawford*, *supra*, 541 U.S. at p. 61.)[16]

The trial court decided that the conspiracy to commit insurance fraud ended when appellant and Lewellen were arrested on November 21, 2001. Appellant contends that the trial court erred in finding that the conspiracy had not ended earlier, before November 6, 2001, the date that Lewellen gave the statement to Detective Enriquez and Agent Holden. Respondent contends that because the insurance claim was still pending at the

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14 *Crawford* rejected, in part, the rule of *Ohio v. Roberts* (1980) 448 U.S. 56 -- that the admission of hearsay did not violate the Confrontation Clause if the declarant was unavailable and the court follows certain criteria to determine the reliability of the statement. (*Crawford*, *supra*, 541 U.S. at pp. 62-64, 68.)

15 Rejecting any suggestion that the Supreme Court held that no coconspirator statement to the police can ever be testimonial, a federal appeals court explained, "*Crawford* had no occasion to consider the situation we face: statements that are both in furtherance of a conspiracy and testimonial." (*U.S. v. Stewart* (2d Cir. 2006) 433 F.3d 273, 292 (*Stewart*).)

16 When conducting a de novo review of a ruling affecting the right to confrontation, we defer to the trial court's resolution of factual conflicts but independently review its decision. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, 898.) In this case, the facts necessary to a determination under *Crawford* were not in conflict. We therefore apply an independent, nondeferential review to the undisputed facts as well as the decision. (See *People v. Cromer*, *supra*, at p. 903.)

time of Lewellen's police interview, the conspiracy was ongoing. Respondent cites the general rule that an insurance-fraud conspiracy normally terminates upon the receipt of the insurance proceeds. (*People v. Hardy* (1992) 2 Cal.4th 86, 143 (*Hardy*), citing *People v. Saling* (1972) 7 Cal.3d 844, 847, 852, and *People v. Leach* (1975) 15 Cal.3d 419, 436.)

Hardy is distinguishable. The statements in *Hardy* were not made in the course of a police interrogation, as they were in this case. The *Hardy* court was "fully cognizant of Justice Jackson's eloquent admonition that 'the looseness and pliability of the doctrine [of conspiracy] present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.' [Citations.]" (*Hardy*, *supra*, 2 Cal.4th at p. 144, quoting *Krulewitch v. United States* (1949) 336 U.S. 440, 449 (*Krulewitch*) (conc. opn. of Jackson, J.), first brackets in original.) Nevertheless, the court concluded that the conspiracy theory was not inflated or pressed "solely to provide a 'vehicle for using otherwise inadmissible hearsay evidence against a defendant.' [Citation.]" (*Hardy*, at pp. 144-145.) Here, in contrast, appellant was the only alleged conspirator who was tried. Appellant's brother Mario was named as a conspirator in the information filed against appellant but was never charged. Lewellen had been charged, but the case against him was dismissed after the preliminary hearing and never refiled.

Assuming for the moment that the conspiracy continued to exist at the time Lewellen was interrogated, the admissibility of his statements -- under both the hearsay exception and the Confrontation Clause -- turns on whether they were made in furtherance of a conspiracy. (See *Giles v. California* (2008) __ U.S. __ [128 S.Ct. 2678, 2691]; *People v. Brawley* (1969) 1 Cal.3d 277, 288-291.)

"[T]he 'in furtherance' requirement was motivated by a desire to strike a balance between the need for conspirators' statements in order to combat undesirable criminal activity which is inherently secretive, and the need to protect the accused against idle chatter of criminal partners as well as inadvertently misreported and deliberately

fabricated evidence. [Citations.] Because of the in furtherance limitation on the admissibility of [a] coconspirator's statement, a damaging statement is not admissible under [Federal Rules of Evidence, rule] 801(D)(2)(E) unless it tends to advance the objects of the conspiracy as opposed to thwarting its purpose." (*United States v. Fahey* (1st Cir. 1985) 769 F.2d 829, 838-839.) As more fully explained below, Lewellen's interrogation tended more to thwart the purpose of the conspiracy than to advance its objects. It is also clear from the videotape that the two detectives were operating under the assumption that the conspiracy had been frustrated and effectively curtailed. Indeed, one hears toward the end of the tape that that Holden and Enriquez expressed their intention to charge Lewellen, appellant, and Mario with conspiracy, and Holden testified at trial that she found Lewellen to be deceptive.

Like Evidence Code section 1223, Federal Rules of Evidence, rule 801(d)(2)(E) (28 U.S.C.) provides that statements made in the course of and in furtherance of a conspiracy do not constitute inadmissible hearsay. In applying rule 801(d)(2)(E), federal courts have described "in furtherance of" as excluding "merely narrative declarations." (*U.S. v. Fielding* (9th Cir. 1981) 645 F.2d 719, 726.) "A statement that simply informs a listener of the declarant's criminal activities is not made in furtherance of the conspiracy; instead, the statement must 'somehow advance the objectives of the conspiracy.' [Citation.]" (*U.S. v. Mitchell* (8th Cir.1994) 31 F.3d 628, 631-632.) However, "[w]hen a declarant '"'seek[s] to induce [the listener] to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objective,'"' the declaration may be admissible. [Citation.] Statements concerning activities of the conspiracy, including future plans, also may become admissible when made with such intent. [Citation.]" (*United States v. Foster* (9th Cir. 1983) 711 F.2d 871, 880, some brackets in original.)[17]

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[17] Commentators have described statements in furtherance of a conspiracy as "operative rather than informational." (Seigel & Weisman, *The Admissibility of Co-*

The California Supreme Court has said that ". . . whether statements made are in furtherance of a conspiracy depends on an analysis of the totality of the facts and circumstances in the case. [Citations.] Accordingly, '[a]lthough it has been held that statements which merely narrate past events are not to be deemed as made in furtherance of a conspiracy [citations], such a rule cannot be applied mechanically.' [Citation.]" (*Hardy*, *supra*, 2 Cal.4th at p. 146, some brackets in original.) Statements made after the completion of the crime and discovery of the facts by law enforcement may further the conspiracy if the conspirators intended the statements "to maintain the integrity of their security until they received payment for their participation in the crime." (*People v. Saling*, *supra*, 7 Cal.3d at p. 852, fn. 8.) Thus, post-discovery statements to law enforcement may be admissible where the "essence" of the conspiracy was to "provide false information to government agencies during the course of their investigation and during interrogations that would produce testimonial statements of one or the other of them." (*Stewart*, *supra*, 433 F.3d at p. 292 [conspiracy to obstruct justice and commit perjury].)

However, "[i]n many cases, a statement of a coconspirator made after apprehension 'does not in any sense further the criminal enterprise, but rather frustrates it.' [Citation.] Such statements are often the antithesis of 'furthering' or 'advancing' the criminal objective because they reveal secret actions by coconspirators which law enforcement can use to prevent the conspirators from realizing their criminal objective." (*Hardy*, *supra*, 2 Cal.4th at p. 146.)

The United States Supreme Court has cautioned that to be admissible, a coconspirator's statement must have been made in furtherance of the conspiracy that is charged; the exception may not be expanded to include statements "made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment." (*Krulewitch*, *supra*, 336 U.S. 440, 443-444; see also *Hardy*, *supra*, 2

Conspirator Statements in a Post-Crawford World (2007) 34 Fla. St. U. L. Rev. 877, 900.)

Cal.4th at p. 145.) Respondent acknowledges this rule, but suggests that because the appellant-Lewellen-Arturo-Mario conspiracy was to commit insurance fraud and they had not yet obtained the insurance proceeds, avoiding detection was part of the charged conspiracy. Respondent points out that the insurance claim was technically still pending on November 6, 2001, and speculates that "Lewellen participated in the interview because he hoped to fool the police into believing he and appellant were innocent of any wrongdoing [in order to] increase their chances of successfully committing insurance fraud." [18]

Respondent's argument tacitly suggests a rule that in every insurance fraud case, the court must find all statements to law enforcement to be in furtherance of the conspiracy so long as the insurance proceeds have not been paid. None of the cases on which respondent relies enunciates or supports such a rule. The results in these opinions turn on their own particular facts. (See, e.g., *Hardy*, *supra*, 2 Cal.4th at p. 145; *People v. Noguera* (1992) 4 Cal.4th 599, 626; *People v. Sully* (1991) 53 Cal.3d 1195, 1231; *U.S. v. Garcia* (8th Cir. 1990) 893 F.2d 188, 189-190; *United States v. Fahey*, *supra*, 769 F.2d at pp. 838-939.)

Other than *Hardy*, only one of the cited cases involved a conspiracy to commit insurance fraud; in *People v. Noguera*, *supra*, 4 Cal.4th 599, the common objective of the coconspirators -- the defendant, Abram, and Dominique -- was to kill Dominique's mother, divert suspicion with a false report, and share in the victim's estate and insurance

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[18] In a letter brief filed after oral argument, respondent contends that its position is supported by *Stewart*, *supra*, 433 F.3d 273, in which a coconspirator statement to the police was held admissible under *Crawford*. We disagree. In fact, the *Stewart* court held that the coconspirator statements to the police in that case were testimonial, but they were made in furtherance of the *charged* conspiracy to obstruct justice by lying to authorities. (*Id.* at pp. 291-292.) In *Stewart*, the indictment alleged a conspiracy to obstruct justice and commit perjury. (*Id*. at p. 280.) Here, the information did not allege that Lewellen gave his statement in order to fool the police; the *charged* conspiracy was lying to the insurance company, not the authorities. As *Stewart* did not speculate, as respondent urges here, that there was an uncharged conspiracy to lie to the police, it is inapposite.

proceeds. As an integral part of the agreed plan, Dominique reported to a neighbor and to the police that a burglar had raped her and murdered her mother. (*Id*. at p. 617.)

In *Hardy*, the court cited the pending nature of the insurance claim to uphold the admission of conspirator statements over a hearsay objection, but the court emphasized that there is no rigid rule in insurance fraud cases. (*Hardy*, *supra*, 2 Cal.4th at p.146.) Hardy's conspiracy consisted of an agreement to kill the wife of one of the coconspirators (Morgan) and collect the proceeds of her insurance policy, from which the others (Hardy and Reilly) would be paid. (*Id.* at pp. 119, 142-144.) After the murders of Morgan's wife and son, Reilly's girlfriend Debbie told the police that Morgan had expressed a desire to kill his wife, but she did not mention Reilly, who had been her source. (*Id*. at p. 121.) Reilly told Debbie that Morgan's complicity must not be revealed, and then he questioned her about what she had told the police in order to conform his story with hers and formulate an alibi with Hardy. (*Ibid*.) Later, when Reilly and Hardy were in jail, one of them told Hardy's girlfriend words to the effect that they still expected to recover from the insurance proceeds, i.e., "their insurance money was collecting interest." (*Id*. at p. 123.) The statements were not made in the course of a police interrogation but to other alleged conspirators and their friends at a time when the conspiracy to obtain and share insurance proceeds "hinged on . . . Morgan's ability to avoid being blamed for the killings." (*Id*. at p. 146.)

Here, the jury found that appellant had conspired with others to commit insurance fraud by presenting a false or fraudulent claim -- acts committed before the detectives interrogated Lewellen. There was no evidence, as in *Hardy*, that the conspirators agreed to tell a particular story to law enforcement, nor was there evidence that appellant had agreed to pay Lewellen or that Lewellen or any other conspirator expected payment from the insurance proceeds. Indeed, the cash found in Arturo's trunk suggests that if he was paid, he was paid before he set the fire. The mere existence of a pending insurance claim does not mean that all coconspirator statements made before the insurance company pays are made in furtherance of the conspiracy. (See *People v. Saling*, *supra*, 7 Cal.3d at pp.

853-854 [coconspirator statements inadmissible in murder-for-hire case without evidence that payment was to come from proceeds of victim's life insurance policy].)

Further, any conspiracy in this case to collect or share insurance proceeds had been frustrated by the date of Lewellen's videotaped interrogation. The day before Lewellen's interrogation, California Fair Plan's adjustor determined that there were no new television sets and no new mattresses as claimed by appellant. As soon as he learned those facts, the insurance company's vice president suspended the adjustment of the claim but considered it complete for purposes of determining fraud. He testified that the contents claim was rejected at the time of that determination. As a result, on the date of Lewellen's police interview, the conspiracy was effectively frustrated and over even though the insurance claim technically remained open. Coconspirator statements made to investigators after a conspiracy has been thwarted cannot be said to be in furtherance of the conspiracy. (*Callan v. Superior Court* (1962) 204 Cal.App.2d 652, 664-665.)

For these reasons, respondent did not show that Lewellen's statements to law enforcement were made in furtherance of an objective held in common with appellant -- except perhaps "an alleged implied but uncharged conspiracy aimed at preventing detection and punishment." (*Krulewitch*, *supra*, 336 U.S. at pp. 444.) Such uncharged subsidiary objectives do not support admissibility. (*Ibid*.) It follows that respondent did not establish the prerequisites -- an ongoing conspiracy and a statement made in furtherance of it -- that would make Llewellyn's statement nontestimonial for purposes of *Crawford*, *supra*, 541 U.S. at p. 57.

In other respects, Lewellen's statements to the detectives were clearly testimonial. In *Crawford*, the court said that police interrogations "fall squarely" within the class of testimonial statements. (*Crawford*, *supra*, 541 U.S. at p. 53.) They "'were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' [Citation.]" (*Id*. at p. 52.) Further, although the Court declined to adopt a specific definition of "interrogation," it found that a "recorded statement, knowingly given in response to structured police questioning,

qualifies under any conceivable definition." (*Id*. at p. 53, fn. 4.) In addition, there was no "ongoing emergency" that would render Lewellen's responses to police questioning nontestimonial. (*Davis v. Washington* (2006) 547 U.S. 813, 822.) "[T]he primary purpose of the interrogation [appeared to be] to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid*.) Because appellant was given no prior opportunity to cross-examine Lewellen, we conclude that the trial court erred in overruling appellant's *Crawford* objection. (See *Crawford*, *supra*, 541 U.S. at p. 59.)

Respondent contends that any Confrontation Clause violation is harmless under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), which asks whether it is reasonably probable appellant would have achieved a more favorable result absent the error. Respondent argues that the Lewellen videotape implicated appellant only "very little." Respondent concedes that Lewellen admitted inaccuracies in the proof of loss, but argues that no prejudice occurred because that fact was undisputed and Lewellen provided innocent explanations for the inaccuracies, which might even have helped appellant. Respondent also argues that Lewellen's admission that he prepared the proof of loss and his accusation that a tenant set the fire were helpful to appellant. Finally, respondent states the conclusion, without further analysis of the evidence, that "there was overwhelming evidence that appellant submitted a fraudulent claim."

The *Watson* test of prejudice is applied to the erroneous admission of hearsay. (*People v. Davis* (2005) 36 Cal.4th 510, 538.) However, Confrontation Clause violations are subject to the harmless-error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140; *People v. Cage*, *supra*, 40 Cal.4th at pp. 991-992.) Under the *Chapman* test, the People bear the burden to establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, at p. 24; see also *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

Respondent has not attempted to show harmless error under the *Chapman* test. It only contends that any error was harmless under the *Watson* test. In its one paragraph

discussion about prejudice, respondent asserts that Lewellen's videotaped statements did little to implicate appellant. In fact, they did a great deal to implicate appellant. They substantially eroded appellant's evidence suggesting that Arturo acted alone out of spite. For example, Lewellen described what had been in the hotel office and safe before the fire. The officers then told him that the office and safe had been completely empty when they were searched right after the fire. Lewellen also told the officers that Arturo was happy just before the fire and had no reason to set the fire. The officers explained to Lewellen how these facts pointed to careful planning by both Arturo and appellant and showed that Arturo's motive must have been money – to be paid by appellant.

Respondent argues that Lewellen helped appellant's defense by offering innocent explanations for inaccuracies in the proof of loss and by suggesting that a tenant started the fire. In fact such statements made Lewellen -- and therefore appellant -- appear guilty.[19] Lewellen claimed that a tenant had threatened to bomb and burn the hotel but admitted that he reported that tenant's threats approximately one month *after* the fire, suggesting the fabrication of a suspect.

We also agree with appellant that Lewellen's defensive (and occasionally sarcastic, perhaps hostile) demeanor during the interview also harmed appellant's defense.[20] When appellant was afforded the opportunity to cross-examine Lewellen in the third trial -- after he was granted immunity -- Lewellen seemed less defensive and gave plausible explanations for his attitude. In addition, Lewellen took the blame for errors in the proof of loss. He acknowledged that he had prepared the inventory and

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[19] Agent Holden testified that Lewellen's demeanor suggested he was untruthful in "plenty of places."

[20] The aspect of the videotape most damaging to the defense may well have been the officers' accusations and arguments. Enriquez and Holden laid out the facts they believed to be proof of a well-planned conspiracy and then told Lewellen he was going to be charged with fraud and homicide. Enriquez then said to Lewellen, "[I]f you want to spend the rest of your life in jail, by all means, take your chances in court. . . ."

claimed that he had to induce appellant to sign the proof of loss, explaining that appellant's emotional state made him uninterested in submitting an insurance claim. Lewellen described Ortiz's participation in the preparation of the personal property inventory as "nothing." Moreover, appellant's acquittal on all counts remaining in the third trial -- including conspiracy to commit insurance fraud --helps to contradict respondent's claim that the results of the first two trials would not have been different had Lewellen's hearsay statements been excluded.

Crawford reminds us that the ultimate goal of the Confrontation Clause involves assessing reliability "in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." (*Crawford*, *supra*, 541 U.S. at pp. 61-62.) Mr. Ortiz's three trials serve as a case study in what can happen when cross-examination is denied to a party. Lewellen knew he was a target during the videotaped interview, and the first two juries saw the guarded attitude of a man threatened with prison by two skilled questioners. The jury in the third trial saw him in person and had the benefit of cross-examination. The first two juries convicted on insurance fraud counts; the third jury did not.

Respondent also contends that appellant's *Crawford* issue should be deemed waived as to the second trial, because defense counsel withdrew it, apparently believing that any coconspirator statement was admissible without violating the Confrontation Clause regardless of whether it was made in furtherance of the conspiracy. Respondent concedes that appellant preserved his hearsay objections as to both trials and his *Crawford* objection as to the first trial. The first question in a *Crawford* analysis "is whether proffered hearsay would fall under a recognized state law hearsay exception. If it does not, the matter is resolved, and no further *Crawford* analysis is required." (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 5.) Because the issues, facts, and the court's hearsay rulings were identical in both trials, the analysis is identical, and it is improbable

that the court would have sustained the *Crawford* objection in the second trial. We therefore exercise our discretion to reach the issue as to both trials. (See generally *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310-311.)

Respondent finally contends that the evidence of appellant's fraudulent intent was overwhelming. However, respondent's contention is stated as a conclusion without discussing any supporting evidence. We conclude that respondent has not carried its burden to establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at p. 24.)

Because we conclude that the judgment must be reversed, we do not reach the remaining issues.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOHR, J.*

We concur:

RUBIN, ACTING P. J.

FLIER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.